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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenors-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE*

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE*

This brief is submitted with the consent of counsel of the parties on behalf of the National Jewish Commission On Law And Public Affairs and is joined in by the following organizations:

Agudath Israel of America
Association of Orthodox Jewish Teachers
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

Interest of the *Amicus Curiae*

The National Jewish Commission On Law And Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Recognizing the importance of a healthy educational system to the welfare of a free society, the Commission firmly supports the advancement of educational opportunity for all American schoolchildren. We believe that the welfare of all society benefits through programs that promote the betterment of the education of all children. Accordingly, we submit this brief in the belief that the New York Textbook Law, consistent with the principle of separation of church and state, is a legitimate and equitable expression of the State's esponsibility for the development of educational programs which are essential to all schoolchildren.

Question Presented

Is New York barred by the First and Fourteenth Amendments from adopting an educational program, completely under the control of public authorities, which provides for the loan of approved textbooks in secular subjects to students who attend elementary and secondary schools which also provide religious instruction?

Statement of the Case

The appellants brought an action challenging the constitutionality of the New York Textbook Law (Chapter 320 of the Laws of 1965; Education Law, Section 701), which went into effect on September 1, 1966. Section 701.3 provides:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The complaint alleged that this section violated the New York State Constitution and the First and Fourteenth Amendments to the United States Constitution. The trial court ruled that the law contravened both the federal and State constitutions. The Appellate Division, Third Department, reversed on the ground that appellants lacked standing. The court added that it was "satisfied" that the statute contravened neither the federal nor the State constitution. Two justices stated in a concurring opinion that the textbook law "did not aid directly or indirectly the school attended by said child."

The Court of Appeals reversed as to appellants' standing and by a majority vote upheld the statute, with the majority declaring that "the statute is meant to bestow a public benefit upon all school children . . . ." An appeal was taken to this Court and probable jurisdiction was noted on January 15, 1968.

Argument

The State government has a responsibility for the proper education of children of school age within the State. This duty does not end when children receive their secular instruction in parochial schools. Because textbooks are vital to curriculum development and to the fulfillment of educational opportunity, a State may decide that the public welfare is advanced through a public program guaranteeing adequate textbooks to all schoolchildren.

New York's textbook program is wholly public in its conception and administration; the statute, administrative rulings and procedures adopted by local public educational officials insure that the books are supplied on a loan basis, remain the property of public boards of education, are those that can be used in public elementary and secondary schools, and concern only secular subjects. No control is vested in sectarian authorities nor does the program, directly or indirectly, promote religion or assist religious institutions.

Rulings of this Court and relevant expressions by noted constitutional authorities make plain that, consistent with the establishment and free exercise clauses, State governments may adopt a neutral role in religious affairs by extending public benefits to children attending parochial as well as other private schools in an effort to promote the general welfare and insure full educational opportunity for all schoolchildren. Indeed, a State's refusal to provide for the welfare of parochial schoolchildren, while meeting the needs of all other students, public and non-public, may possibly infringe the religious freedom of the children who exercise their constitutional right to receive secular instruction in church-related schools.

POINT I

New York's textbook program is designed to promote the public interest in the proper education of all schoolchildren, irrespective of the school they attend.

A. The State's Responsibility for Education.

The Constitution of New York, Art. XI, Sec. 1, in common with the policy in all our other states, guarantees a free public education to all children of school age within the State. The purpose of this provision is to make crystal clear the State's obligation in the area that is at the heart of the health and welfare of society. As the Court stated in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship." So important is this responsibility that the costs of elementary and secondary education are today the highest items in the budgets of our states and local communities. These costs continue to rise with the growing awareness that education requires the fullest commitment of governmental resources.

Non-public schools, whether private or parochial, perform this key governmental responsibility when they educate students in the subjects that ordinarily are taught in the public schools. They do so not because they reduce the pressure on the public exchequer, but because they are doing the job of government in much the same way that government would do it. Private and parochial schools, therefore, are quasi-public institutions; they are like hospitals operated under private or sectarian auspices which perform the governmental responsibility for the maintenance of public health and are vested with a public interest. Accordingly, it is of major governmental concern that children or patients served by such public institutions under nongovernmental sponsorship are not denied general secular aid within the constitutional limits which have been expressed by this Court.

The responsibility of New York, like any other state, for the education of all children between the approximate ages of six and seventeen is not satisfied simply because students are enrolled in a school of their choice and formally comply with the compulsory education law. The government's commitment, consonant with the very reason why it invests so heavily in education, extends to the heart and dynamic of the educational process—to the quality and effectiveness of instruction and to what goes on in the classroom. The State willingly shoulders the guarantee that the process of education will not be an empty one, producing children who do not develop their potential and are incapable of meeting the needs of our growing society.

We can point to no litmus test which will tell us when this qualitative concept of educational responsibility is fulfilled. Yet, this much is clear: the State's responsibility to insure and encourage excellence in elementary and secondary education extends to the student whatever his school—public or non-public.

New York has laws and regulations governing the safety of buildings used as schools, the adequacy of laboratory, library and other educational facilities, the length of the school day, the number of days in the school calendar, and the subjects taught. Satisfactory performance on Regents Examinations is required in specified high school subjects; this requirement does not vary according to who operates the school. Moreover, consistent with the State's responsibility for the health, safety and welfare of school children, New York maintains a busing program available to all students and many localities provide school crossing guards. Similarly, in defining and articulating the nature of its commitment to the educational welfare of all students in elementary and secondary schools, New York has undertaken a textbook program which benefits all students in grades seven through twelve. New York has done so for

reasons plainly expressed in the preamble to the challenged statute:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the States and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the State that the public welfare and safety require that the State and local communities give assistance to educational programs which are important to our national defense and the general welfare of the State."

The New York Court of Appeals in upholding the statute, had this to say about the statement of policy:

> "There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. *No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.*" (20 N.Y. 2d at 116; emphasis supplied).

We do not maintain that the State is constitutionally mandated to extend qualitative educational benefits to children who attend non-public schools, but when it decides that it is in the public interest to include in one over-all program all schoolchildren in a public program operated and supervised by public officials, there can be no question that this affirmation of a public responsibility is fully consistent with the First Amendment. Indeed, the warning

sounded by Mr. Justice Black in *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947), then becomes most relevant:

> "... we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

B. The Role of Textbooks in Curriculum Development.

Recognition of the pivotal importance of textbooks in the educational process is central to an understanding of the nature of the public benefit here under attack. Quality instruction requires that students have quality texts. In 1931 a distinguished committee of educators established by the National Society for the Study of Education declared that "it is the textbook that in thousands of classrooms determines the content of instruction as well as the teaching procedures." *The Textbook in American Education,* Thirtieth Yearbook of the National Society for the Study of Education, Part II, p. 1. A more recent study of the use of texts begins: "At the center of the present-day educational scene in America is the textbook. It takes a dominant place in the typical school from the first grade to the college. Only the teacher—and perhaps a blackboard and writing materials—are found as universally as the textbook in our classrooms." Lee J. Cronbach, *Text Materials in Modern Education* 3 (1955).

A survey article on the subject in the *Encyclopedia of Educational Research* 1517 (3rd ed. 1960) explains the acceptance of textbooks:

> "Originally ... the American school whether public or private was a language school—a school in which reading and arts and sciences dependent upon reading were its *raison d'etre.* To this day it stands true to that purpose. It is—besides many other things—a school of the book, using the term *book*

> in its widest and most useful sense. The historical process, thertofore, has added a fourth dimension to the three already mentioned as the essentials of the American school system. That system—call it S—now basically includes T the teacher, P the pupil, M the meeting place, and B the book. In brief, S comprises T, P, M, and B."

Textbooks are a means of transmitting knowledge and culture to students. They serve as a bridge to the learner, helping him understand and respond to his own environment. Given the present utilitarian and functional bent of education, there is, according to education experts, no substitute methods for students to acquire the basic information which they must have if they are to progress properly in their studies and also be prepared to become responsible and self-reliant citizens. There is simply too much to learn to expect the educational process to operate without these storehouses of accumulated knowledge and experience. With the recent growth of so many disciplines, particularly in the physical and behavioral sciences, it is clear that reliance on textbooks in years to come will increase radically.

Text materials establish the framework for classroom instruction, but they can do much more. For the inquisitive student, they provide an opportunity for self-instruction transcending the day to day learning process, opening up new vistas of personal investigation in library books and other avenues of exploration. For the teacher, especially those in fields subject to quick and far-reaching change, "the text is potentially an educational leader which can beckon teachers into new paths." Lee J. Cronbach, "The Learning Process and Text Specifications," *Text Materials in Modern Education, supra*, 90.

If students are not provided up-to-date quality texts, the learning process—and inevitably society—suffer. The State, therefore, has a direct and fundamental interest in seeing to it that students in all schools are properly equipped with current textbooks. This is what New York

has done through its textbook program. No allegation of violation of the First Amendment should obscure the fact that the provision of textbooks is designed to insure a proper education for all children in elementary and secondary schools within the State in fulfillment of the State's educational responsibilities.

C. The State's Control Over the Textbook Program.

The textbook law enacts a public program which promotes a vital public responsibility and interest. It is also important to recognize that in all respects the program is subject to full control by public authorities and is not controlled by religious officials.

According to Section 701.3 of the textbook law the job of selecting the books is vested in local public school boards; the texts are required to be those "designated for use in any public, elementary or secondary schools of the State or . . . approved by any boards of education, trustees or other school authorities." The State Board of Regents and the local boards of education are authorized to prescribe rules and regulations governing the loan of textbooks to schoolchildren.

Following the adoption of the law and prior to its effective date, the State Department of Education, in an Opinion of Counsel,* elaborated on the provisions of the law. Paragraph 6 of the Opinion, entitled "Limitations on kinds of textbooks," declares that it is necessary that

> "a. The textbook be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority), and
>
> b. The textbook had been designated for use in any public elementary or secondary schools of the state or . . . approved by any school board."

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* The entire opinion is printed in the Appendix to the Appellants' brief.

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same, itself."

Thus, the effect of this Opinion is to reinforce the public character of the program and the administrative control of public school boards, in line with the intent of the New York Legislature. Another paragraph of the Opinion underscores the same principle:

"16. *Accounting and Storage.*

a. All books remain the property of the School district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection."

While public control is made crystal clear, the Opinion also demonstrates that the program creates a direct relationship between a public agency and individual students:

"12. *'Upon individual request'*:

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the non-public school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence."

However, individuals cannot purchase books on their own and then seek to collect payment from their local school boards. In recent proceedings the New York Commissioner of Education ruled that "since the [textbook] statute, further, does not provide for textbook purchases by individuals, I cannot, therefore, in any event, direct the respondents to honor invoices for textbooks so purchased and acquired by the individual appellants." *In the Matter of Rosemary Williams,* No. 7831, Ruling of Commissioner James E. Allen, Jr., November 9, 1967.

School boards throughout New York State have issued instructions and prepared forms designed to guarantee that they will exercise the requisite public control over the program. These instructions plainly belie the allegation that sectarian officials will determine the operations of the program. For example, in New York City, a list is compiled annually by the Board of Education "for use in requesting textbooks in accordance with New York State Textbook Law." A statement introducing the 1967 edition of the list makes abundantly clear how public control has been strictly and exclusively maintained:

> "Titles on the approved List of Textbooks have been appraised by committees of supervisors and teachers in the various subject-matter areas. These committees have been guided by established evaluative criteria approved by the Board of Education. These criteria were set forth in full in the brochure 'Selecting Instructional Materials for the Public Schools of New York City.'"

The 1967 list comprises 508 pages; not a single listing is of a book that is in any way sectarian in its content.

New York City's Board of Education has also issued a "Manual of Instructions" containing "Record-keeping Procedures for Textbooks Loaned in Conformance with Provisions of the New York State Textbook Law." (The Manual, without the sample forms, is set forth as an Appendix to this brief.) These instructions show that

the books are merely loaned to the students, with ownership permanently remaining in the Board.

Accordingly, we submit that plainly the New York Textbook Program retains in all aspects its public character and purpose, which is to guarantee educational opportunity to all schoolchildren.

POINT II

The textbook program is not an "establishment of religion" in violation of the First Amendment.

New York's textbook statute is challenged principally on the ground that it establishes religion. This allegation apparently is based on the notion that the public nature and purposes of the program are irrelevant to a determination whether the major objective of the law is to benefit society or religion.

Religion does not benefit, either directly or indirectly, when New York performs its duty to guarantee a quality education to children in both public and non-public schools. The program under attack here is in its entirety a public enterprise; control, as we have seen, is fully vested in public officials; no money is given to any religious institution; nor is a parochial school free to allocate funds to sectarian purposes as a result of this law. In *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, 374-375 (1930), this Court upheld an identical statute, making plain the relevance of the public facets of the statute in determining the constitutional question:

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that

> the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction."

Speaking for a unanimous Court, Chief Justice Hughes said of the statute:

> "Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." *Ibid.*

To be sure, *Cochran* was not decided on First Amendment grounds. This fact, however, does not devitalize its logic nor does it limit its applicability to cases where First Amendment allegations are not raised. In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court plainly rejected the opportunity to overrule *Cochran.* Indeed, Mr. Justice Rutledge, in dissenting, linked the earlier decision on textbooks with the new ruling on the busing of parochial schoolchildren (330 U.S. at 29).

In *Everson,* this Court upheld a New Jersey statute reimbursing parents of parochial schoolchildren for the costs of transportation to and from school and explicitly declared that the public purpose of the State's program was crucial to a determination of the infringement *vel non* of the establishment clause. After declaring that the intention of the establishment clause was to erect "a wall of separation between Church and State," Mr. Justice Black declared:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." (330 U.S. at 16)

Mr. Justice Black went on to say that the First Amendment does not prohibit New Jersey from spending public funds to pay the bus fares of parochial school students even though "it is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State" (at p. 17).

The *Everson* decision compels a similar result with respect to the New York Textbook Law. A state program of transporting children to school affects all students equally and is more closely related to religious education than is the supplying of textbooks. In the first place, it is highly unlikely that a parent's decision whether to send his child to one school rather than another will be influenced by the existence of a textbook program with a maximum outlay per year of $15 per child. In addition, while transportation brings the child to the school in which he receives both secular and religious instruction, only secular textbooks are furnished by the State.

In its most recent explication of the establishment clause, this Court said:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the stricture of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District* v. *Schempp,* 374 U.S. 203, 222 (1963).

What is the purpose of the New York statute? Surely, as we have demonstrated in Part I, there is a "secular legislative purpose" in a program which is designed to supply quality secular educational tools to schoolchildren. The fact that textbooks are furnished to students in all private schools—parochial and non-parochial—makes it clear that the purpose of the law is secular. What is the law's primary effect? Clearly, it is not the advancement of religion, for no church or religious program is assisted through the provision of secular textbooks which remain the property of the State. Indeed, it requires a distortion of both the purpose and the effect of the statute to contend that either in its conception or administration the textbook program promotes a sectarian purpose or advances reli-

gion. The purpose and effect of the law is simply to make available to all schoolchildren the best possible textbooks—nothing more and nothing less.

Thus, the constitutionality of the statute is clearly encompassed within the views of Mr. Justice Frankfurter, an ardent believer in strict separation between church and state, who declared in *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961), that "once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."

The textbook law implements the State's vital interest in the education of all schoolchildren. To reach a decision of unconstitutionality would require repudiation of the standard that this Court has consistently referred to in "establishment" cases. And, to do so, would mean not only to break with precedent but also to strike down numerous federal and state programs similarly effectuating valid state interests but involving sectarian institutions. The National Defense Education Act, the Elementary and Secondary Education Act, and the G.I. Bill of Rights are three congressional statutes that would be struck down in whole or in large part. State laws providing loans and scholarships to students in sectarian colleges would face a similar fate.

Moreover, a ruling that this limited textbook program is unconstitutional would have an impact on social welfare programs far beyond the field of education and would strike at the heart of the entire anti-poverty program which to a far greater extent than the furnishing of textbooks utilizes church-related institutions to accomplish secular legislative purposes. These enactments, along with New York's Textbook Law, reflect the belief of legislators throughout this country that the modern conception of the governmental responsibility to promote the general welfare requires the extension of public benefits to individuals who receive public services in sectarian institutions and do not infringe the establishment clause.

POINT III

New York's statute does not violate the free exercise clause of the First Amendment.

The textbook program is also attacked as an infringement of the free exercise clause of the First Amendment. We believe that this claim requires little attention because it is patently without any foundation. The key element in the denial of one's right to practice his religion is compulsion and it is plain that the statute is not in the slightest bit cocercive. As Mr. Justice Clark stated in *Abington* v. *Schempp, supra*:

> "The free exercise clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 374 U.S. at 222-23.

When schoolchildren are supplied with secular textbooks, it is somewhat strained, we submit, to maintain that anyone is coerced in the practice of his religion.

While the free exercise claim raised by the appellants is spurious, we believe that the theory behind the First Amendment requires this Court to consider whether the denial of secular textbooks to parochial school students, while the state furnishes such textbooks to children in all other schools, would be a denial of the freedom of religion of these students and their parents. State discrimination of this sort amounts to forbidden pressure on religious-minded persons when utilizing their constitutional privilege of parochial school education in order to receive public benefits extended to all others by the State.

In *Everson* v. *Board of Education, supra*, Mr. Justice Black declared:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." 330 U.S. at 16.

Mr. Justice Black continued that this does not mean that "a state could not provide transportation only to children attending public schools." But, Mr. Justice Black did not suggest in *Everson* that the State was free to discriminate against religion by transporting all non-parochial schoolchildren. Accordingly, Professor Kurland has interpreted *Everson* to mean that "a classification [of governmental assistance] in terms of public and non-public schools would be valid." Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 29 (1961). To Professor Kurland, the church-state opinions of this Court add up to a single principle: "That government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." (At page 96.) Another eminent scholar wrote recently:

> "To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv. L. Rev. 513, 515 (1968).

These ideas have long found acceptance in the decisions of this Court: "Freedom of religion is not merely reserved for those with a long purse." *Follett* v. *McCormick*, 321 U.S. 573, 576 (1944). Thus, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) the Court ruled that South Carolina had infringed the free exercise of religion of a sabbath observer when it denied her unemployment compensation after she lost a job for refusing to work on Saturday. Mr. Justice Brennan, speaking for the Court, held:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the state's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as only being indirect. *Braunfield* v. *Brown*, . . ." 374 U.S. at 403-04.

We submit that to disqualify parochial school students from governmental benefits made available to all students —public and non-public—would constitute religious discrimination in patent violation of *Sherbert* v. *Verner*. New York's Textbook Law avoids such invidious discrimination—its benefits are available to all as the benefits of South Carolina's unemployment compensation law were not. We urge the Court to uphold the minimal right of the State of New York to promote a public policy that avoids placing any pressure on those who out of religious principles attend schools that are affiliated with religious institutions.

POINT IV

The religion clauses of the First Amendment read together require that the State maintain a position of neutrality in religious affairs and this end is furthered by the textbook program.

In *Abington* v. *Schempp, supra,* Mr. Justice Clark after reviewing the previous decisions regarding the "establishment" and "free exercise" of religion, concluded that the two clauses overlap in promoting a "wholesome 'neutrality'" in church-state relations. The *Everson* majority also thought this to be the purpose of the First Amendment: "That amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." 330 U.S. at 18.

The doctrine of neutrality has been authoritatively accepted as the correct meaning of the principle of separation of church and state. Accordingly, the State need not extend to all who receive secular instruction or other public services through church-related institutions the same benefits that it extends to those who receive the same services directly at or from public institutions; but neutrality does not forbid the State to furnish public benefits to persons at sectarian institutions.

Governmental neutrality in religious, as well as political and social matters, is at the heart of the healthy operations of our pluralistic society. If it is the hope and the purpose of the First Amendment to promote religious tolerance and freedom while minimizing abrasive religious conflict and tension, then a plan which permits the government to make available public benefits to persons at sectarian institutions is consistent with the First Amendment. On the other hand, the distortion of the separation principle to preclude such a program inherently highlights the religious factor, poisons the air of pluralism, and potentially increases competition between religious sects. For behind our belief in the separation of church and state, built into

the fabric of a pluralistic society, is the idea of voluntarism, the right of all to believe or not to believe and for those who profess religious faith of any kind to build up institutions that enable them to express their beliefs. Voluntarism is fundamental to religious liberty; it encompasses both religion clauses of the First Amendment. The aim of voluntarism

> ". . . is not to remove governmental burdens on the practice of religion but rather to assure that the establishment clause does not force the categorical exclusion of religious activities and associations from a scheme of governmental regulation whose secular purposes justify their inclusion. The principle of political neutrality recognizes that religious associations operate in the temporal realm and accordingly can be legitimately included among the beneficiaries of the prevailing order established and sustained by the state. If religious groups are to be effectively organized bodies rather than loose associations of mendicants, they must be able to own property, enter into contracts, hire employees, and engage in a host of activities with secular dimensions and consequences. In short, making religious voluntarism a reality requires that religious associations be treated with political equality and accorded civil opportunities for self-development on a par with other voluntary associations. For instance, to deprive churches of police and fire protection—because the state would be aiding religion in violation of the establishment clause—would be insupportable doctrine. The extremely serious disadvantage to religious associations would mark governmental hostility toward their development, not neutrality, and such invidious discrimination could lead only to bitterness and strife in the political arena, not insulation of politics from religion." Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, supra*, at 519-20.

Professor Giannella goes on to conclude that

> "When there are both sound public policy reasons of a secular nature for extending certain benefits to religious activities and associations and countervail-

> ing policy reasons for not doing so, the matter is appropriately left for the legislature." *Id.* at 521.

See also Katz, *Religion and the American Constitutions* 75 (1964).

The position of Professors Giannella and Katz has been supported by numerous constitutional authorities, among them Professors Philip Kurland, Arthur G. Sutherland, Jr. (see, *Religion and the American Constitutions, supra* at 74); Robert E. Cushman (*Public Support of Religious Education in American Constitutional Law,* 45 Ill. L.Rev. 333 (1950)), and Paul G. Kauper, who stated:

> "If a strict neutrality theory is followed, the answer to the constitutional problem is readily indicated. By extending aid to all institutions that serve the secular purpose of the government's program, whether public or private, church-related or not, the government is being neutral. Indeed, it would be less than neutral and would be discriminating on religious grounds if it withheld assistance from church-related institutions only." Kauper, *Religion and the Constitution* 108 (1964).

Each of these noted authorities has fashioned his conception of the neutrality approach out of the previous decisions of this Court. They accept in full, as do we, the desirability of separation of church and state. We submit, in conclusion, that the "wholesome neutrality" in religious affairs that the First Amendment ordains as a precondition of religious liberty requires a decision upholding the right of the New York State Legislature to promote the public interest in education by providing secular textbooks to schoolchildren in all schools within the state.

Respectfully submitted,

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APPENDIX

Board of Education—City of New York

MANUAL OF INSTRUCTIONS

ON

RECORDKEEPING PROCEDURES FOR TEXTBOOKS LOANED IN CONFORMANCE WITH PROVISIONS OF THE NEW YORK STATE TEXTBOOK LAW

(CHAPTER 320, LAWS OF 1965)

JANUARY, 1967

1. TEXTBOOK INVENTORY RECORD

1.1 A Textbook Inventory Record card shall be maintained for each list-numbered text received. See Exhibit "A" for suggested form of this Textbook Inventory Record card.

1.2 The Textbook Inventory Record card shall record the date and number of books received, the number issued, the number returned and the balance.

1.3 At the end of each school year (or more often if desirable) a physical inventory shall be taken and the count recorded on the Textbook Inventory Record card. (See Section 3 on Physical Inventories.)

1.4 Books accounted for as "lost" (See Section 4 on Lost Textbooks) shall be recorded periodically on the Textbook Inventory Record card.

1.5 Books which are no longer useable because of condition should be returned to the Bureau of Supplies of the Board of Education. The Bureau of Supplies will issue receipts for such returns. These receipts should be kept on file and the number of books returned recorded under "Remarks" on the Textbook Inventory Record card.

1.6 Reasons for unusual discrepancies between physical inventory and the Textbook Inventory Record card, as adjusted for lost book entries and entries for discarded books should be explained in the column headed "Remarks".

2. Students' Requests for Loan of Textbooks

2.1 Any student to whom a textbook is loaned shall certify that he has requested and is in receipt of the textbook loaned to him in accordance with the provisions of the New York State Textbook Law, Chapter 320, Law of 1965, and that he is a resident of the New York City School District enrolled in grades 7-12.

2.2 The requests and certifications shall be separate for each list-numbered textbook.

2.3 The requests for any list-numbered textbook may be made by groups or classes or may be individual. (See Exhibit "B" for sample of request by a group or class.)

2.4 The requests shall be kept on file at the school, separated by list-numbered textbooks, and shall be available for audit by the Board of Education of the City of New York.

2.5 A "check mark" (√) should be placed in the "Reissue" column for any book which is not being issued for the first time.

3. Physical Inventories

3.1 A physical count shall be taken at the end of each school year of all textbooks on loan.

3.2 The physical inventory shall include textbooks out on loan as well as those in stock.

3.3 This physical inventory together with a reconciliation with the books received shall be prepared in duplicate (Exhibit "C").

3.4 One copy of the Textbook Inventory and Reconciliation shall be forwarded to:

Board of Education
Bureau of Supplies
44th Road and Vernon Boulevard
Long Island City, New York 11101

The duplicate shall be kept in the school files.

4. Lost Textbooks

4.1 The Board of Education of the City of New York requires its students to pay for destroyed, lost or mutilated textbooks on the following basis:

New (less than 1 year old)	90% of List Price
Good (1-2 years old)	75% of List Price
Half-Worn (2-3 years old)	50% of List Price
Old (over 3 years old)	33⅓% of List Price

(List prices may be obtained from the Textbook Order Manual or by contacting the Bureau of Supplies of the Board of Education.)

4.2 Students receiving textbooks on loan under the New York State Textbook Law shall be subject to the penalties set forth above for destroyed, lost or mutilated textbooks.

4.3 Collections of monies for destroyed, lost or mutilated textbooks shall be recorded on separate lists for each list-numbered textbook. The record shall contain the period covered, the list number, title and author of the textbook, the names of the students paying penalties, the book numbers of the destroyed, lost or muti-

lated books and the amounts collected. (See Exhibit "D".) These records of collections shall be maintained at the school and shall be available for audit.

4.4 At the end of each semester, all monies collected shall be summarized by titles of textbooks (Exhibit "E"). This summary, together with a covering letter (Exhibit "F") and a check covering total collections during the period, payable to the order of the "Administrator of Business Affairs" shall be forwarded to:

Board of Education
Bureau of Supplies
44th Road and Vernon Boulevard
Long Island City, New York 11101